In the Supreme Court of the United States

NELLIE ALLEN POAGUE, Petitioner,

vs.

BUTTE COPPER AND ZINC COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now comes Nellie Allen Poague, the above named petitioner, and respectfully petitions the Court for the issuance of a Writ of Certiorari addressed to the said United States Circuit Court of Appeals for the Ninth Circuit, directing said Court to certify the above entitled cause to this Court for review and final decision.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 10, 1947. (R. 442.)

The jurisdiction of the District Court arises from U. S. C. A., Title 28, Sec. 41; Sec. 24 of the Judicial Code, as amended.

The jurisdiction of The Supreme Court arises from

U. S. C. A., Title 28, Sec. 347; Sec. 240 of the Judicial Code, as amended by the Act of February 13th, 1925, 43 Stat. 936. The facts conferring jurisdiction of the District Court appear R. 2, diversity of citizenship and amount involved.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Nellie Allen Poague, a citizen of Montana, brought an action at law in the United States District Court of Montana, against Butte Copper and Zinc Company, a corporation of, and citizen of Maine, owning mining property in Montana. The action was for damages because of subsidence of her land under her buildings surrounded by the Nellie Lode Mining Claim, property of the Zinc Company, due to underground mining. This underground mining, however, was not done by the owner (proprietor) of the surrounding adjacent land, the Zinc Company, but was done by a lessee, mining under an operating contract from the owner, and which mining was done with the knowledge and consent of the Zinc Company. Of the net proceeds from the mining, whatever it might come to, the Zinc Company received one-half. (No fixed rent was defined in advance.)

The following quotation from the Circuit Court of Appeals' opinion reveals succinctly what we contend is error of that Court, and the ruling of the District Judge, which we submit was correct:

> "The jury was further instructed (in substance) that if a preponderance of the evidence convinced the jury that Anaconda did the actual mining work,

with the knowledge and consent of Butte, and as its lessee, and such mining operations disturbed and withdrew from the surface of the property of plaintiff the subjacent or lateral support of the said surface, as a direct and proximate result of which the surface subsided and caused injury and damage to the plaintiff's buildings, then the defendant (Butte) was liable for all resulting damages.

Obviously the evidence made plain that Anaconda was doing mining work 'with the knowledge and consent' of Butte. The lease agreement and the working of the mine by Anaconda under the terms of the lease, proclaim that to be a fact which Butte would not and does not deny. We are here concerned with the established status of Butte and Anaconda under their lease agreement, a status which in our opinion does not impose upon Butte legal liability for the injuries visited upon the proprietor of appellee. The Court's instructions were clearly erroneous in that they did unlawfully impose liability upon Butte for the mining operations carried on by Anaconda under the premises of appellee, *all of which operation were carried on under and by virtue of the terms and conditions of the lease agreement between Butte and Anaconda.*" (Italics ours.)

There is no opinion of the District Court. The Appellate Court's opinion is found R. 432. It was entered November 10, 1947. It will be reported 164 Fed. (2nd), 201.

The case was tried to a jury in the District Court. Verdict and judgment in favor of Poague for damages exceeding $3,000.00, exclusive of interest and costs.

The Circuit Court of Appeals disposed of the case finally and completely by an opinion reversing *on just one ground* which recited:

> "Since we are of the view that under the facts of this case, appellee is not entitled to recover from appellant, we find it unnecessary to pass upon other contentions raised in the brief. The Judgment of the lower court is reversed."

After such language, of course, further litigation in the trial court is vain. Petition for rehearing was made, and denied Dec. 10, 1947. R. 443.

QUESTION INVOLVED.

Is there a non-delegable duty resting on the owner (proprietor) of adjacent surrounding land, and of the minerals under adjacent land, to not disturb, by mining thereunder, the surface of his neighbor's land, and not permit others by lease of, or working contract, (contemplating dangerous excavation on his land) the surface of his neighbor's land to be injured by the removal of the lateral and subjacent support given by nature of his own land to the neighbor's land?

SPECIFICATION OF ERRORS.

I.

(a) The Honorable, the Circuit Court of Appeals, has here decided a question of local law in a way in conflict with applicable local decisions. It is important. The decision challenges, clouds and impairs the quiet enjoyment of all other urban real property, as also that of a large section of Butte, wherein, by this operation, churches, schools, apartment buildings, residences have been destroyed.

II.

The question of a primary liability of the owner as distinguished from the liability of the lessee has been acted on differently by the Circuit Court of Appeals of the Sixth Circuit in Harris Stanley Coal and Land Co. vs. Chesapeake & Ohio Ry. Co., 154 Fed. 2nd 450, and in that case, certiorari was denied,

No. 438 October term, 1946, 91 L. Ed. 65. Advance Sheets.

(The point was not raised there, however; possibly because deemed beyond debate.)

III.

Petitioner asserts that her right to lateral and subjacent support from adjacent land of Zinc Company is as a covenant running against the owner of adjacent land, a servitude against such land which the owner cannot lawfully impair by any contract with a third party, to which petitioner was not a party.

IV.

She asserts that the question is of great importance. The territorial jurisdiction of the Ninth Circuit Court of Appeals is immense. The decision is in conflict not only with local decisions of Montana, where the case arose, but also with those of California, where has long existed an identical statute to that of Montana. The question has local importance. As appears from the citations to the record in the accompanying brief, through the same mining operation, a large section of the City of Butte

has subsided, to lasting damage of buildings used for schools, churches, apartments, residences; breaking water mains, gas mains, breaking the surface of streets. The growing use of subways and deep foundations gives the question importance outside of mining areas. Railway cuts involve the question. As precedent, any C. C. A. opinion is cited in every circuit if germane. This one is opposed to general law.

V.

Petitioner asserts that here the Honorable Ninth Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable decisions of the Montana Supreme Court and of the Montana legislature.

A brief under this cover accompanies this petition.

W H E R E F O R E, petitioner prays that the Writ of Certiorari be issued to the Honorable, the United State Circuit Court of Appeals for the Ninth Circuit, requiring it to certify a transcript of the record of the case to this Court for review and reversal.

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Of counsel for Petitioner.

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Respondent.

PETITIONER'S BRIEF

STATEMENT OF THE CASE.

By stipulation of counsel, Poague, since December 13, 1910, has been, and now is the owner of, and in possession of all of Lot 4 and the North 10 feet of Lot 5, Block 67, Original Townsite of Butte, excepting and reserving, however, all of the ores and minerals beneath the surface thereof, with the right of defendant to mine for and extract the same. R. 27.

This was a part of the Nellie Lode claim, of which the defendant, Zinc Company, was the owner since July 6, 1917. R. 380. On that day Zinc Company leased for mining purposes to a third party, Anaconda Company, the Nellie Lode surrounding the Poague property. R. 371.

By 1918 the workings ran under the Poague property. R. 302. The work continued by the lessee until June 24,

1940. A new agreement and lease, cancelling the old one, was then entered into. R. 394. *By this lease, R. 404, permission was given by the owner to extract and remove all ores and minerals which may be encountered in the Nellie Lode Claim, R. 404.* The workings ran under plaintiff's property in 1918. R. 302. This lease was to run until June 24, 1950. R. 403.

On Poague's property there was a brick house when she bought it. R. 30. Underneath the surface of Poague's property big mining timbers were crushed. R. 196. Large blasts, night and day, were heard, causing pictures to fall, the stove pipe to fall. R. 154.

Poague brought suit; an amended complaint, R. 2, was filed April 1st, 1946. She claimed damages in the sum of $7,000.00, alleging that the defendant, by itself, and through its agent, servant, or partner, Anaconda Company, had, by underground mining in adjacent land, wrongfully destroyed and impaired the subjacent and lateral support of her lands, and both of the buildings thereon. The defendant answered, R. 7, with what amounted to a general denial, and without any affirmative claim that additional weight of buildings had all contributed to subsidence.

Water pipes were broken over a large area around the property. Testimony of Plummer. R. 109. R. 153.

The course of the main escarpment caused by the mining operation was described through streets and across streets, under apartment properties, under a hospital, and the ground South of the main escarpment for 500 feet had sunk since 1922. R. 261. One building had been damaged and torn down. R. 273. These escarpments were

observed simultaneously with the work of mining. R. 294. One escarpment struck a school building. R. 293. One struck the Jewish Synagogue. R. 292. Mining was the cause of the movement on the fault. R. 292.

These citations are but a sample. The record contains many other instances casually mentioned.

On a trial before a jury, verdict was in favor of the plaintiff. R. 11. Judgment being entered, R. 12, the defendant appealed, R. 13. The Circuit Court of Appeals reversed and limited its decision to the one point,—that the owner, defendant, lessor, and a party to the working contract, was not liable for acts of Anaconda. R. 432.

Certiorari is asked to review that decision.

We have specified the errors in the petition for Certiorari annexed. For convenience, we repeat both the question involved and the Specification.

QUESTION INVOLVED.

Is there a non-delegable duty resting on the owner (proprietor) of adjacent surrounding land, and of the minerals under adjacent land, to not disturb, by mining thereunder, the surface of his neighbor's land, and not permit others by lease of, or working contract (contemplating dangerous excavation on his land) the surface of his neighbor's land to be injured by the removal of the lateral and *subjacent* support given by nature of his own land to the neighbor's land?

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ARGUMENT AND AUTHORITIES.

The approach to this argument recalls happy days of fifty-five years ago in the Old Rotunda near Monticello where one of the glaring sign posts on the road to Wisdom said:

"Bower v. Peate, 1 Queen's Bench Division 321."

The opinion was delivered by Cockburn, Chief Justice, whom we were told was one of the ablest judges of all time. It is most unusual that we can answer one test to gain a review in this Court; that is the "importance of the question," with high legal authority, but this opinion starts out:

> "The facts of this case *which involves a point of considerable importance* * *".

The subsequent growth of English and American cities points the truth that the learned Chief Justice was understating, when he said that the point was of *considerable importance.*

We think that the question which was then of sufficient importance to engage a review by the Court of Queen's Bench is now of sufficient importance to ask this Court for a Writ of Review. On private civil rights the opinion carries its credentials on its face. Fifty-five years ago it was regarded as a leading case.

In 1926 the author of a note found to:

> Pickett v. Waldorf System 241 Mass. 569; 136 N. E. 64; 23 A. L. R. 1014, wrote:

> "The following passage in the judgment delivered by Cockburn, Ch. J., in Bower v. Peate, which is regarded both in England and the United States as

a leading case, contains the most accurate and comprehensive exposition of the doctrine discused in this monograph: 'A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevent may arise."

We have checked the quotation with the language of the Court. It is exact.

Some courts have strayed from this doctrine, and come back by their own subsequent decisions.

The California Court strayed away in Aston v. Nolan, 63 Cal. 269. It came back in Green vs. Berge, 38 Pac. 539; 105 Cal. 52, and based its ruling right on Bower vs. Peate, as also on a case from Massachusetts, a case from

Pennsylvania, and a case from Vermont.

In 1892 the claim of the defendant here, was raised in Cohen vs. Simmons, 21 N. Y. Supp. 385. The New York Court spoke of the claim that only the contractors were liable, and not the owner.

"This proposition does not merit discussion."

The opinion was not by the court of last appeal in New York, but successive appeals resulted in affirmance without opinion. The New York Court in that opinion disposed of the question as to whether *negligence* is involved.

> "It is entirely immaterial as far as this act is concerned whether the excavator allows the adjoining house to fall scientifically, or negligently."

Respectful of that language; Poage did not charge that the act of causing her house and lot to subside was negligent, but just that it all caved in, due to the act of undermining.

The local decision of the Montana legislature on this point is found in a statute identical with the California statute on the subject. The Supreme Court of California in Green v. Berge, supra, refers to the California statute; each statute is exactly:

> "Each co-terminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precaution to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations."
>
> R. C. Mont., 1935, Sec. 6773. Cal. Civil Code, Sec. 832.

The Montana statute has been in effect since 1895.

Sec. 1293 Civil Code of Montana, 1895.

The part of the foregoing statute commencing with "subject to" has no relevancy; mining has no purpose of contruction.

Probably the Montana statute was taken from California. That question, too, is beside the case, because English words mean the same in Montana as they do in California. The California court speaks of their statute in Green vs. Berge, supra, as follows:

> "A landowner has an interest in adjoining land for the lateral support of his soil. This is a limitation upon the rights of landowners. Whoever deprives him of this support for the land, otherwise than as the statute has prescribed, performs an unlawful act. The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. Respondent knew, or should have known, that to make the excavation without supplying the support was unlawful. Having participated in it, he cannot avoid responsibility by pleading that he did the work under a contract."
>
> Green v. Berge, 1894, (supra).

The liability of the land owner was again recently sustained by a California Court of Appeals.

> Wharam v. Investment Underwriters, (Cal. App.) 136, 136 Pac. (2nd) 363. (1943.)

There the Court remarked:

> "This holding is supported by the weight of authority throughout the United States."

MONTANA HOLDINGS.

The Montana Supreme Court has quoted with approval almost as much from Bower v. Peate, supra, as we have in this brief.

Ulmen v. Schwieger, 92 Mont. 331, at page 348; 12 Pac. 2nd 856.

The owner of a quarry, a nuisance from concussion of air by blasting, was enjoined, along with a lessee or independent contractor. There the court said the law was the same in an action for damages as it was for an injunction.

Fagan v. Silver, 57 Mont. 427, 188 Pac. 900.

Blasting underground may be just as legally a nuisance as blasting above ground.

If the nuisance consists merely of a deadly threat,—a powder house too close to homes, the landlord cannot delegate the keeping of it so as to avoid liability.

Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312; 56 Pac. 358. (Opinion by Judge Hunt, one of the leading judges of the Montana Supreme Court, and also of the Ninth Circuit Court of Appeals.)

> "* * * and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why, then, should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of the decisions in this class of cases? In fact, those decisions which make the statement that it does, overlook the public duty

of the owner and consider the duty of the landlord and tenant inter sese."

Mitchell v. Thomas, 91 Mont. 370, at page 389; 8 Pac. 2nd 639.

And again:

"In the second place, the corporation, the owner of the property, in arranging to have repairs done upon it, the installment of which would probably result in creating a condition dangerous to neighboring property owners, was under obligation to provide that reasonable care should be taken to obviate the probable consequences. As was pointed out in Railroad Co. vs. Morey, 47 Ohio St. 207, 7 L. R. A., 701, 24 N. E. 269, a proprietor's liability 'is based upon the principle that he cannot set in operation causes dangerous to the person or property of others, without taking all reasonable precautions to anticipate, obviate and prevent these probable consequences.' Under this rule, an employer may not divest himself of the primary duty he owes to other members of the community by contracting with others for the performance of work, the necessary or probable result of which is injury to third persons. Other courts have stated the rule in substantially the same terms."

A. M. Holter Hardware Co. v. Western Mortgage Co., 51 Mont. 94; 149 Pac. 489.

"A proprietor is an owner, and an owner is a proprietor."

Bouvier's Law Dictionary.

The opinion of the learned Court of Appeals seems to us to be specious. The Court looked for the liability of the owner in the wrong place, i. e., in the contracts between landlord and lessee. The Court cites some cases where the liability also does exist there, and distinguishes

the facts here from such cases. The place to find the liability is in the law of lateral and subjacent support, as announced by courts, and as found in the Montana Statute. It is an easement in favor of a landowner to have his surface sustained by the land of his neighbor. It is a covenant raised by law against adjoining land. A similar covenant might arise from contract. It frequently does. There, it is a covenant running with the land against adjoining land. The owner of the latter cannot break it directly or indirectly.

Thus considered, it is not surprising to find that no case cited by the learned Court of Appeals is in point against Poague's contention. (Candidly, there is one from Pennsylvania of date 1846, many years before Bower v. Peate.)

The first case cited in the opinion, R. 437, is that of Greek Catholic Congregation vs. Plummer, (Pa.) 12 Atl. 2nd, 435. The action involved the ownership of coal alleged to have been wrongfully taken from plaintiff's land by defendants. It was a suit to recover for coal taken from land which the defendant had quiteclaimed to a lessee in settlement of a controverted title. The Court held that the defendant was not owner.

The case of Alabama Clay Products Company v. Black, 110 So. 151, cited in the opinion went off on a point of pleading not involving merits.

The Court cited Republic Iron & Steel Co. v. Barter (Ala.) 118 So., 749, at p. 751. R. 438. A later Alabama case which seems in favor of our position.

Butte Copper and Zinc had previously opened the mine, had mined certain ores. Later Anaconda, under a lease

from Butte, re-mined this property, and the plaintiff's property subsided. The case of Republic Iron & Steel Co. v. Barter (Ala.) 1928; 118 So. 749, was an action by the owner of the surface against the owner of the mineral rights thereunder, and it appeared that the defendant in the past, opened a mine under the plaintiff's property and had mined the coal therefrom, leaving pillars and stumps sufficient for subjacent support of the surface, but for several years past, had not operated the mine. Later, defendant leased the property to one Blackwell to mine the coal that was left, and provided that "the lessee is to secure from all surface owners, written releases relieving the company from damage claims as a result of mining operations, breaking the surface, etc." and gave to the lessee full charge of the operations. The lease also contained a clause "that the lessee shall save the company harmless against * * * and pay any claims of any owners of the surface." The surface subsided and the appellant owner contended that Blackwell the lessee *and not the lessor,* was liable. Final judgment went against the owner.

> "Yet where, as here, the lease contemplates and expressly authorizes the lessee to rob the mine of pillars, and leave the surface without subjacent supports, the lessor as well as the lessee, is liable. Little Schuylkell Navigation R. Coal Co. v. Tamaqua, 1 Walk. (Pa.) 488; Campbell v. Louisville Coal Mining Co., 39 Colo. 379, 89 P. 167, 10 A. L. R. (N. S.) 822. This on the principle embodied in the maxim "Sic utere tuo ut alienum non laedas."
>
> Williams v. Gibson, 84 Ala. 228, 233, r. S. 350, 5 Am. St. Rep. 368, 60 Atl. 924, 69 L. R. A. 637.

> The principle is established by universal authority that the right to subjacent support, unless waived by express stipulation, is absolute, and the owner of the servient estate is liable for its destruction without regard to whether it is destroyed by or through negligence or design, without negligence. Ala. Clay Products Co. v. Black, 110 So. 151; West Pratt Coal Co. v. Dorman, et al., 161 Ala. 389; 49 So. 849, 23 L. R. A. (N. S.) 850, 135 Am. St. Rep. 127, 18 Ann. Cas. 750; Republic Iron & Steel Co. v. Barter (Ala.) 118 So. 749, at p. 751.

With reference to the duty of surface support, the Supreme Court of Alabama, after the decision in the case of Alabama Clay Products vs. Black, supra, relied upon by this Court, said:

> "It cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right and rests upon the owner of the servient estate.
>
> * * * And this is true, though no control or direction over the work is retained and exercised."
>
> Republic Iron & Steel Co. v. Barter, supra.

So that the Alabama law cited does not support the conclusion of the Court at page 5 of the opinion.

The Court also cites the case of Jackson Hill Coal Co. v. Bales (Ind.) 108 N. E. 962. R. 437. No facts are stated in that opinion, but it does appear that the Court did give Instruction No. 2 (see 108 N. E. at p. 964) to the effect that "the owner of the minerals could not remove same without leaving proper support for the surface." The case apparently held the owner of the mine

and not the lessee, liable. It does not support the proposition for which the Court has cited it.

The Pennsylvania case of Kistler v. Thompson, 27 Atl. 874, R 438, was an action brought by the owner of a dwelling house against the defendant owner of the mine for work done by a lessee thereof which injured plaintiff's house and lot. The Supreme Court passed upon the charge of the Court below to the jury in that case.

> "The defendant was the owner of the mine. He received the royalty for the coal taken out. It was his interest to have as much coal taken out as was possible, and did give frequent and explicit directions as to taking coal from the pillars and supports of the mine."

Admittedly there was control there, but the question of liability without control was not decided.

In the case of Cabot v. Kingman (Mass.) 33 L. R. A., 44 N. E. 344, R. 438, it was held that sewer commissioners were liable together with the independent contractor for destruction of lateral support in constructing a sewer regardless of the question whether or not control over the manner of operation had been retained.

The limitation on the exceptions to the doctrine of respondent superior as applicable to subsidence from withdrawal of lateral or subjacent support is ably discussed in:

> Thompson on Negligence, paragraphs 654, 665 and 668.

In 1918, the workings had passed under Poague's property. R. 302. In the new lease to the same lessee

from the defendant of June 24, 1940, appear the following words:

> "It is agreed that the Mining Company shall have the right, during the term hereof, to work all of the said premises above described and referred to in mining fashion, and extract and remove therefrom all ores and minerals which may be encountered, and which in the Mining Company's opinion it may be desirable or profitable to extract and remove." R. 404.

But the courts knew, as all other sensible persons would know, as early as 1927:

> "It goes without saying that the removal of any part of subjacent support has some tendency to bring down what is above."
>
> Standard Oil Co. vs. Watts, C. C. A. 7th, 1927, 17 F. 2nd 981.

The doctrine of respondent superior does admit exceptions as to some acts of independent contractors, but where there is a primary duty resting on one, he cannot escape liability where he contracts with another to do work that will probably result in breach of that duty unless precautions are taken, and such precautions are not taken and detriment to the obligee is so caused.

The great work of the Circuit Courts of Appeal has created such respect for the opinions of those Courts that the opinion from any circuit is proudly cited as precedent in other circuits. A decision may have importance not only for being cited as a precedent in actual litigation, but also from being cited as a precedent in the examination of titles and servitudes inherent in the ownership of real property.

We respectfully submit that this opinion of the learned Circuit Court of Appeals is erroneous, and it clouds the right to quiet possession of all urban, and much rural real property in the Ninth Circuit—it befogs such rights throughout the United States.

We think that beyond a doubt, the Honorable Circuit Court of Appeals is in error here, and that the probability of conflict with local decisions is beyond reasonable doubt, and that the question is as Lord Cockburn found it seventy-five years ago,—of great importance, and that the Writ should issue.

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